No. 06-388

In The
Supreme Court of the United States

ROBERT S. WILLIS,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of Louisiana,
Third Circuit

OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of La. Code Evid. art. 414.2, violated the *ex post facto* clause of the United States Constitution.

2. Whether the prosecutor's comments during argument, rendered petitioner's trial so unfair as to constitute a denial of due process.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iii
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	1
Law and Argument	2
I. Whether application of La. Code Evid. art. 414.2 violated the *ex post facto* clause of the United States Constitution	2
II. Whether the prosecutor's comments during argument rendered petitioner's trial so unfair as to constitute a denial of due process	10
Conclusion	11

TABLE OF AUTHORITIES

Page

CASES

Calder v. Bull, 3 U.S. 386 (1798) 3, 4

Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) 3, 4, 7, 8

Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715 (1990) 5

Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883) 5

McCulloch v. State, 39 S.W.3d. 678 (Tex.App. – Beaumont 2001) 6, 7

People v. Dolph-Hostetter, 664 N.W. 2d 254 (Mich.App. 2003), appeal denied, 674 N.W. 2d 380 (Mich. 2004) 9

State ex rel. Olivieri v. State, 00-172, 00-1767 (La. 2/21/01), 779 So.2d 73, cert. denied, 533 U.S. 936, 121 S.Ct. 2566 (2001) 4

State v. Kennedy, 00-1554 (La. 4/3/01), 803 So.2d 916 2

State v. Morgan, 02-3196 (La. 1/21/04), 863 So.2d 520 2

Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) 8

Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) 5

U.S. v. Johnson, 354 F.Supp. 2d 939 (N.D. Iowa 2005) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. 1 sec. 10 1
La. Const. Art. 1 sec. 23 4
Federal Rules of Evidence 804(b)(6) 9
La. Code of Evidence art. 404(B) 2, 10
La. Code of Evidence art. 412.2 ..... 1, 2, 3, 6, 10
Tx. Code of Criminal Procedure art. 38.37 7

STATEMENT OF JURISDICTION

The Louisiana Supreme Court denied an application for writ of certiorari and/or review on June 23, 2006. An application for rehearing was not filed with the Louisiana Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, sec. 10 of the United States Constitution prohibits ex post facto application of criminal law. It states:

> No State shall enter into an Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing to Obligation of Contracts, or grant any Title of Nobility.

At the time of the petitioner's trial, La. Code of Evidence art. 412.2 provided:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.

C. This article shall not be construed to limit the admission or consideration of evidence under any other rule.

LAW AND ARGUMENT

I. Whether application of La. Code Evid. art. 412.2 violated the *ex post facto* clause of the United States Constitution.

The Respondent adopts the following reasoning and opinions of the Louisiana Third Circuit Court of Appeal regarding the application of Louisiana Code of Evidence art. 412.2, as follows:

The Defendant contends the trial court's retroactive application of La. Code Evid. art. 412.2 violated the *ex post facto* clause.

At the time the offenses at issue were committed, La. Code Evid. art. 404(B) governed the admissibility of evidence regarding other crimes, wrongs, or acts. In 2001, the Louisiana Legislature enacted Article 412.2, in response to *State v. Kennedy*.[1] The Defendant contends the application

[1] *State v. Kennedy*, 00-1554 (La. 4/3/01), 803 So.2d 916. In *Kennedy*, the supreme court held that aggravated rape was a general intent crime; therefore, the only issue pertinent was whether penetration

(Continued on following page)

of this article to his case was a violation of the *ex post facto* clause.

The Louisiana Supreme Court has not decided whether the retroactive application of Article 412.2 is a violation of the *ex post facto* clause. In footnote two of *State v. Morgan*, 02-3 196 (La. 1/21/04), 863 So.2d 520, the supreme court noted that the retroactive applicability of Article 412.2 "remains an open question." *Id.* at 521. However, the Louisiana Third Circuit Court of Appeal concluded the retroactive application of Article 412.2 did not constitute a violation of the *ex post facto* clause.

This Honorable Court has interpreted the *ex post facto* clause of the United States Constitution as prohibiting four types of laws. In *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620 (2000), the court cited *Calder v. Bull*, 3 U.S. 386, 390 (1798), listing the four types of *ex post facto* laws as follows:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*" *Id.*, at 390 (emphasis in original).

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occurred. As the evidence regarding other crimes did not bear upon an essential element of the offense, it was inadmissible.

Carmell, 529 U.S. at 522, 120 S.Ct. at 1627. This Court also stated that it has "repeatedly endorsed this understanding, including, in particular, the fourth category." *Id.* at 525, 120 S.Ct. at 1629.

Louisiana Constitution Article 1, § 23 also prohibits the enactment of any *ex post facto* law. In *State ex rel. Olivieri v. State*, 00-172, 00-1767 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566 (2001), the Louisiana Supreme Court followed the current federal approach to the *ex post facto* analysis and held that the basis of the analysis should be whether the law alters the definition of criminal conduct or increases the penalty and not whether the change in a law operates to the disadvantage of an individual. *Id.* The court stated in footnote twenty that its exclusion of the fourth category set out in *Calder*, 3 U. S. 386, should not be interpreted as a rejection of that category. *Olivieri,* 779 So.2d at 735.

The Petitioner argues that Article 412.2 is an *ex post facto* law of the fourth federal category. In *Carmell*, 529 U. S. at 532-33, 120 S.Ct. at 1632-33 (footnote omitted), this Court affirmed the use of the fourth *ex post facto* category and declined to limit its application to statutes that alter the burden of proof, explaining:

> A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof (see *infra*, at 1636-1639). In each of these instances, the government subverts the presumption of innocence by excluding the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce

> a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction.

Additionally, this Court mentioned that it does not distinguish between statutes that are procedural or substantive. This Court stated:

> The better understanding of *Collins'* discussion of the *Ex Post Facto* Clause is that it eliminated a doctrinal hitch that had developed in our cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving "substantial protections" and those that are merely "procedural." Both *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883), and *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) – the two cases *Collins* overruled – relied on just that distinction. In overruling them, the Court correctly pointed out, "the prohibition which may not be evaded is the one defined by the *Calder* categories." 497 U.S. at 46 [110 S.Ct. 2715]. Accordingly, *Collins* held that it was a mistake to stray *beyond Calder's* four categories, not that the fourth category was itself mistaken.

Id. at 539, 120 S.Ct. at 1636 (citing *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990)).

The Louisiana Third Circuit Court of Appeal had to determine whether the application of Article 412.2 to this case required the State to present less or different testimony than that law required at the time the offenses at issue were committed. The Petitioner argues that the admission of evidence pursuant to Article 412.2 significantly relaxed the standard under which prior sex crimes and alleged acts may be admitted and the admission of such evidence is likely to "predispose the jury into believing that the defendant committed the crime for which he is presently on trial, rather than evaluating the present facts and rendering a verdict based on those facts." The Petitioner contends this effectively lowers the State's burden of proof and allows for the presentation of evidence vastly different than that allowed when the offenses were committed. Accordingly, the Petitioner argues the admission of evidence pursuant to Article 412.2 violates the *ex post facto* clause.

The Louisiana Third Circuit Court of Appeal referred to jurisprudence from other states for instructive and persuasive purposes only. For example, in *McCulloch v. State*, 39 S.W.3d 678 (Tex.App. – Beaumont 2001), the defendant was convicted in January 2000 of aggravated sexual assault of his stepdaughter. The offense occurred in August 1988 and was reported to the police in November 1997. Between the time of the alleged offense and the time of trial, the Texas legislature enacted Article 38.37 of its Code of Criminal Procedure which provided that:

> evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense . . . shall be admitted for its bearing on relevant matters, including:

> (1) the state of mind of the defendant and the child; and
>
> (2) the previous and subsequent relationship between the defendant and the child.

Id. at 679. Pursuant to Article 38.37, the state offered evidence of other sexual assaults committed by the defendant against the victim before and after the charged offense. On appeal, the defendant argued that the application of Article 38.37 in his case was a violation of the *ex post facto* clause of the United States Constitution. The defendant specifically alleged that Article 38.37, as it was enacted after the charged offense was committed, altered the legal rules of evidence and required less or different testimony that the law required at the time of the commission of the offense. The defendant cited *Carmell*, 529 U.S. 513, in support of his argument.

The court found that *Carmell* was distinguishable, indicated that the statute in *Carmell* "defined the evidence by which a conviction was 'supportable.'" *McCulloch*, 39 S.W.3d at 683. The court noted that Article 38.37 did not lower the *quantum* of evidence necessary to support a conviction, but simply provided that a specific type of evidence would be admissible on certain relevant matters. The court went on to state the following:

> Though it is correct to say that the admissibility of evidence under article 38.37 runs in the State's favor, the retrospective application of the statute cannot be said to violate the *ex post facto* clause on the basis alone. The statute does not lower the quantum of proof required for conviction. Before article 38.37, the child victim's testimony concerning prior "acts" committed by the defendant

> against the child was not admissible unless such evidence fell within an exception under Rule 404(b). In removing the restrictions on that testimony, the statute enlarges the scope of the child's admissible testimony, but leaves untouched the amount or degree of proof required for conviction. Article 38.37 pertains to what kind of evidence may be introduced at law; unlike article 38.07, that statute at issue in *Carmell*, article 38.37 is not a sufficiency of the evidence rule. Here, the question is the admissibility of the evidence, not whether the properly admitted evidence is sufficient to convict McCulloch. *See Carmell*, 529 U. S. at 546[, 120 S.Ct. 1620]. While the evidence is probative, the evidence is not required for conviction of the offense.
>
> In short, article 38.37 eliminates the necessity of showing the evidence falls within one of the Rule 404(b) exceptions. In that sense, it relaxes the strictness associated with Rule 404(b), but, in no way does it alter the quantum of proof required by law to support the conviction. As the court noted in *Thompson v. Missouri*, 171 U.S. 380, 388, 18 S.Ct. 922, 43 L.Ed. 204 (1898), we "cannot adjudge that the accused has any vested right in the rule of evidence which obtained prior to the passage of the [statute], nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offence."

Id. at 684-85 (footnotes omitted).

In *U.S. v. Johnson*, 354 F.Supp. 2d 939 (N.D. Iowa 2005), the defendant was charged in connection with the murder of a witness to alleged drug-trafficking activity by her sometime boyfriend. The government filed a pre-trial

motion seeking the admission of out-of-court statements by several decedents. The defendant argued that the *ex post facto* clause barred the admission of statements made by Terry DeGues pursuant to Rule 804(b)(6) of the Federal Rules of Evidence, because the "forfeiture by wrongdoing" exception to Rule 804(b)(6) was added by an amendment in 1997, four years after the murders. The court held that Rule 804(b)(6) simply changed what evidence was competent in a criminal prosecution and its application to the defendant's case was not an *ex post facto* violation.

In *People v. Dolph-Hostetter*, 664 N.W. 2d 254 (Mich.App. 2003), *appeal denied*, 674 N.W. 2d 380 (Mich. 2004), the defendant, her husband Ronald Hostetter, and Dale Smith were arrested for the murder of a woman occurring in 1996. In 2000, Hostetter plead guilty in exchange for agreeing to testify against the defendant at trial. The defendant filed a motion to exclude her husband's testimony on the grounds that its admission would violate the *ex post facto* clause. Prior to its amendment, M.C.L. § 600.2162 specified that a married person or a person that had been married previously could not be examined regarding any communications made between that person and his/her spouse or former spouse during the marriage. In 2001, the statute was amended to allow for testimony regarding prior communications between spouses or former spouses with the consent of the person being examined. The court noted that the amendment at issue was not analogous to the amendment at issue in *Carmell*, 529 U.S. 513. The court held that the amendment to the marital communications privilege did not alter the quantum of evidence necessary to convict a person, but simply affected what evidence may be introduced at trial and did not violate the *ex post facto* clause.

The retroactive application of Article 412.2 to the Defendant's case did not constitute an *ex post facto* violation. Article 412.2 did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced. Prior to the enactment of Article 412.2, the testimony at issue was admissible if it fell within an exception under La. Code Evid. art 404(B). Article 412.2 merely removed that restriction.

II. Whether the prosecutor's comments during argument rendered petitioner's trial so unfair as to constitute a denial of due process.

The prosecutor in this case stated, "there is no doubt in my mind that this man committed this crime." This comment, when taken alone, appears to be an improper reference to the guilt of the Defendant and would require that a mistrial be ordered. However, when taken in context, this comment does not appear to be improper. This comment was made after a long recitation of the facts, a discussion regarding J.W.'s guilty plea, and the fact that it was up to the judge to sentence J.W., not the District Attorney's Office. The prosecutor's comments in this case came after a discussion of the testimony at trial and the prosecutor did not imply that he had personal knowledge of facts not presented to the jury which indicated the Defendant's guilt.

The defense attorney pointed out in his closing argument that the case hinged on the credibility of C.M. and J.W. Accordingly, a comment by the prosecutor in reference to their credibility was not improper.

CONCLUSION

For the forgoing reasons, respondent submits that this Honorable Court should deny the application to review this case.

Respectfully submitted,

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